

FEDERAL COURT OF CANADA

Trial Division

B E T W E E N:

**GLAD DAY BOOKSHOP INC. and
JEARLD MOLDENHAUER**

Plaintiffs

- and -

**HER MAJESTY THE QUEEN,
MINISTER OF NATIONAL REVENUE and
DEPUTY MINISTER OF NATIONAL REVENUE FOR
CUSTOMS AND EXCISE**

Defendants

AMENDED STATEMENT OF DEFENCE

(Filed this day of June, 1991)

The Attorney General of Canada, on behalf of the Defendants, says as follows:

1. The Defendants admit paragraphs 1, 3 and 5 of the Amended Statement of Claim as well as paragraph 2, except for the description of the responsibilities of the Deputy Minister of Revenue for Customs and Excise (the "Deputy Minister"). The Defendants deny the allegations in paragraphs 4, 5, 6, 8, 9, 10, 11, 12, 13, 14 and 16 of the Amended Statement of Claim, and put the Plaintiffs to the strict proof thereof. The Defendants have no knowledge with respect to the allegations in paragraph 7 of the Amended Statement of Claim.

2. Pursuant to s.114 of the Customs Tariff, S.C. 1987, c.49 (the "Tariff"), the importation into Canada of any goods enumerated or referred to in Schedule VII of the

Tariff is prohibited. Code 9956 of Schedule VII is comprised, in part, of books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are deemed to be obscene under s.163(8) of the Criminal Code.

3. Section 163(8) of the Criminal Code provides that any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of crime, horror, cruelty and violence, shall be deemed to be obscene. Memorandum D9-1-1 sets out the interpretive policy and procedures for the administration of Tariff code 9956 by Customs officials.

4. Section 58(1) of the Customs Act, S.C. 1986, c.1 (the "Act") provides, in part, that an officer may determine the tariff classification of imported goods at any time before, or within 30 days after, the time they are accounted for.

5. Pursuant to s.60 of the Act, the importer may, within 90 days after the officer's determination, request a re-determination of the tariff classification from a designated officer, who shall make the re-determination with all due dispatch.

6. Pursuant to s.63 of the Act any person may, within 90 days after being given notice of a re-determination under s.60, request a further re-determination of the tariff classification, which shall be made by the Deputy Minister with all due dispatch.

7. Sections 67(1) and 71 of the Act provide that a person who deems himself aggrieved by a further re-determination made by the Deputy Minister may appeal that decision to the District Court by filing a notice of appeal within 90 days after notice of the decision was given. Pursuant to s.68(1) of the Act the District Court's decision may, with leave, be appealed to the Federal Court on any question of law.

8. On November 29 and 30, 1988 and December 5 and 8, 1988, Customs officers detained five shipments containing copies of 11 publications imported by the Plaintiffs, which contained short stories, drawings, photographs and comics depicting or describing various sexual activities between homosexual men.

9. On December 6, 7 and 12, 1988, a Customs officer made a determination pursuant to s.58 of the Act that importation of the books into Canada was prohibited because they were classified as obscene under code 9956 of Schedule VII to the Tariff. On February 20, 1989 the Plaintiffs requested a re-determination pursuant to s.60 of the Act.

10. On February 28, 1989 a Tariff and Values Administrator made a re-determination under s.60 of the Act that the books were obscene and prohibited importation into Canada under Tariff Code 9956. The Plaintiffs requested a further re-determination under s.63 of the Act on May 2, 1989.

11. On October 30, 1989 the Plaintiffs commenced this action. On November 17, 1989 the Deputy Minister made her decision classifying the books under code 9956 of the tariff, and thereby confirming that importation of the books into Canada is prohibited.

12. With respect to paragraph 5 of the Amended Statement of Claim, the Defendants deny that any agreement was made between them or their officials and the Plaintiffs that no determination would be made regarding whether subsequent importations of material by the Plaintiffs were prohibited as obscene. A determination of prohibited importation was made on August 3, 1989 with respect to the material detained on August 2, 1989, and the Plaintiffs requested a re-determination of this tariff classification on

November 15, 1989. Determinations of prohibited importation were made on October 16, 1989 with respect to the material detained on October 3 and 4, 1989.

13. With respect to paragraph 6 of the Amended Statement of Claim, a determination of prohibited importation was made on November 10, 1989 with respect to the material detained on August 10, 1989. It was agreed between the Plaintiffs and the Defendants' officials on October 12, 1989 that the determination regarding this importation would not be rendered until the Deputy Minister's decision was finalized with respect to the 1988 importations because the publications in issue were similar. However, at no time was there any agreement between the Plaintiffs and the Defendants that the Defendants' officials would not detain incoming goods or render determinations with respect to detained goods which were imported by the Plaintiffs.

14. The Defendants have no knowledge with respect to the allegations in paragraph 7 of the Amended Statement of Claim, other than that none of the 11 publications which were the subject of the Deputy Minister's re-determination decision on November 17, 1989 are magazines which may become stale-dated.

15. With respect to paragraphs 8 and 9 of the Amended Statement of Claim, the Defendants plead that the Plaintiffs' rights pursuant to s.2(b) of the Canadian Charter of Rights and Freedoms, 1982 (the "Charter") have not been infringed. Code 9956, as defined and applied, and the statutory detention and appeal procedure do not violate s.2(b) of the Charter.

16. In the alternative, if there is a violation of s.2(b) of the Charter, code 9956 and the detention and appeal procedure established by the Act constitute reasonable limits prescribed by law which are demonstrably justified in a free and democratic society under s.1 of the Charter.

17. With respect to paragraph 10 of the Amended Statement of Claim, the defendants plead that code 9956 serves the public purpose of preventing the importation into Canada of obscene materials, which is necessary and desirable for the public good, in addition to Criminal Code obscenity provisions.

18. With respect to paragraph 11 of the Amended Statement of Claim, the Defendants plead that the books contained in the said shipment were sent to the Plaintiffs at different intervals, and that the last 60 books from the shipment were sent to the Plaintiffs in May, 1990. Furthermore, the Defendants' officials repackaged the shipment in a manner as close as possible to the original packing conditions. The Defendants plead that if the goods were damaged, it was a result of poor packaging by the shipper, Inland Book Company.

19. With respect to paragraph 12 of the Amended Statement of Claim, the Defendants plead that the said shipment of magazines entitled "Arjun" was detained on August 2, 1989, and the magazines were determined to be obscene on August 15, 1989. On November 20, 1989, the Defendant's officials received the Plaintiff's request for a redetermination pursuant to s.60 of the Act. The determination that the magazines were obscene was upheld on November 29, 1989, and the Plaintiffs received written confirmation on December 8, 1989. On January 22, 1990, the Plaintiffs requested a further redetermination by the Deputy Minister pursuant to s.63 of the Act. The Deputy Minister determined on February 21, 1990 that the magazines were not obscene, and they were released to Canada Post for delivery to the Plaintiffs on April 23, 1990. The Defendants plead that delays in processing the magazines were caused by the Plaintiffs' failure to request redeterminations expeditiously.

20. With respect to paragraph 13 of the Amended Statement of Claim, the Defendants plead that only 15 copies of the publication "On Our Backs" were contained

in the said shipment and that all copies which were detained were sent to the Plaintiffs. Furthermore, the shipper's description of the contents of the shipment as 25 magazines, which was copied onto the Defendants' documents, was not correct.

21. With respect to paragraph 14 of the Amended Statement of Claim, the Defendants plead that the magazine entitled "Outlook" was detained on October 24, 1989 and was determined to be obscene on November 7, 1989. Despite the Plaintiff's familiarity with the appeal procedures established by the Act, on November 24, 1989 the Defendants received a letter from the Plaintiffs indicating their intention to appeal the determination. The Defendants advised the Plaintiffs by letter that the correct form was required to request a redetermination, and the said form was submitted by the Plaintiffs on January 3, 1990. The magazines were subsequently reviewed and released on February 20, 1990. The Defendants plead that any delay in processing the magazines was caused by the Plaintiffs' failure to submit the appropriate form to initiate the redetermination.

22. The defendants therefore submit that this action, with the exception of the claim contained in paragraph 15, be dismissed with costs.

AMENDED at Toronto this , day of June, 1991.

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DEPUTY MINISTER OF NATIONAL
REVENUE FOR CUSTOMS AND EXCISE**

Defendant.

AMENDED STATEMENT OF DEFENCE

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CUSTOMS AND EXCISE**

Defendants

CONSENT

The parties, hereto, by their solicitors, hereby consent to amendment of the
Statement of Defence in the form attached.

Dated at Toronto this 4th day of June, 1991.

John C. Tait QC

per Debra M. McAllister

John C. Tait, Q.C.

Deputy Attorney General
of Canada

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